TEXASGULF, INC.

IBLA 88-514 Decided April 6, 1990

Appeal from a decision of the Utah State Office, Bureau of Land Management, readjusting the minimum royalty rate on potassium leases U-04563, U-059944, and U-0141157.

Affirmed in part, and reversed in part.

1. Mineral Leasing Act: Generally--Potassium Leases and Permits: Leases

   Readjustment of a potassium lease is an event that occurs at the end of the lease term and may signal
   new minimum royalty requirements, depending upon regulations in force at the time of readjustment.

2. Mineral Leasing Act: Generally--Potassium Leases and Permits: Leases

   A decision to readjust the annual minimum royalty payable for a potassium lease to $3 per acre will
   be affirmed where the regulation in effect at readjustmentprovided for a minimum $3 royalty for
   leases readjusted after the effective date of the regulation. For leases readjusted before the effective date of the regulation authorizing the $3 rate however, the royalty was correctly set at $2, as provided by regulations then in effect.

APPEARANCES: Oliver W. Goshee, Jr. Esq., Salt Lake City, Utah, and Frederick M. MacDonald, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Texasgulf, Inc. (Texasgulf), appeals a May 13, 1988, decision of the Acting Chief, Minerals Adjudication Section, Utah State Office, Bureau of Land Management (BLM), increasing the minimum annual royalty rate payable under potassium leases U-04563, U-059944, and U-0141157 from $2 to $3 per acre.

Texasgulf is the current holder of potassium lease U-04563 1/ effective June 1, 1960, potassium lease U-059944 2/ effective September 1, 1961, and potassium lease U-0141157 3/ which was effective December 1, 1964. The leases were issued pursuant to the Mineral Leasing Act of 1920, 44 Stat. 1057, 30 U.S.C. § 281 (1982), as amended. The leases and applicable Departmental regulations in effect at lease issuance provided for readjustment at the end of the initial 20-year lease periods for each of the three leases.

Each lease reserved to the Government "[t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period." Moreover, 30 U.S.C. § 283 (1982), provided pertinently that:

> Any lease issued under this subchapter shall be for a term of twenty years and so long thereafter as the lessee complies with the terms and conditions of the lease and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such reasonable adjustment of the terms and conditions thereof may be made therein as may be prescribed by
> the Secretary of the Interior unless otherwise provided by law at the expiration of such periods.

Lease U-04563 was therefore subject to readjustment on June 1, 1980, lease U-059944 was subject to readjustment on September 1, 1981, and lease U-0141157 could be readjusted on December 1, 1984. On June 24, 1980, and March 27, 1981, BLM notified Texasgulf that the terms and conditions of leases U-04563 and U-059944, respectively, would be readjusted. On October 30, 1984, Texasgulf was notified that lease U-0141157 was to be readjusted.

On August 26, 1982, Texasgulf was sent a "Notice of Readjusted Lease Terms" for leases U-04563 and U-059944. That notice set forth BLM's proposed lease readjustment terms. A similar notice was sent on March 1, 1985, containing terms for readjustment of lease U-0141157 which included an increase in annual minimum royalty rate from $1 to $2 per acre. Texasgulf did not protest readjustment of lease U-0141157. By decision dated April 26, 1985, BLM readjusted the terms of U-0141157 effective April 1, 1985.

1/ Lease U-04563 was issued to Delhi-Taylor Oil Corporation. Effective Mar. 1, 1961, Delhi-Taylor Oil Corporation assigned the lease to Texas
Gulf Sulfur Company. After segregation in 1965, the lease covers lands in the SW¼ NW¼, W½ SW¼, SE¼ SW¼, sec. 27; the E½ sec. 28; and the SW¼ NE¼, W½, SE¼, sec. 34, T. 24 S., R. 20 E., Salt Lake Meridian, Grand and San Juan Counties, Utah, and lots 1-16 and the S½ sec. 3, T. 25 S., R. 20 E., Salt Lake Meridian. As result of corporate mergers, Texasgulf is the current holder of leases U-04563, U-059944, and U-0141157.

2/ Lease U-059944 covers SW¼, W½ SE¼, sec. 3; SE¼ NE¼, W½ NE¼, N½ SE¼, SE¼ SE¼, sec. 10; W½ SW¼, SE¼ SW¼, sec. 11, T. 27 S., R. 21 E., Salt Lake Meridian San Juan County, Utah.

3/ Lease U-0141157 embraces SE¼, N½ SW¼, SE¼, SW¼, sec. 9; W½, SW¼ SE¼, sec. 10; and N½, N½ SE¼, sec. 15, T. 27 S., R. 21 E., Salt Lake Meridian, San Juan County, Utah.

On September 7, 1982, Texasgulf protested the increase in minimum royalty rate on potassium leases U-04563 and U-059944, objecting that the increase was inconsistent with past expenditures and current operating costs associated with the leases. On September 30, 1985, BLM rejected appellant's protests stating "[t]hese rental and royalty requirements are established under a national policy standard and this [Utah State Office] does not have authority to reduce these minimum requirements." Further, BLM found that Texasgulf could file an application for a temporary rental or royalty rate reduction. BLM explained Departmental policy was

> to consider that application as a separate action from the readjustment. This method would assure the United States a fairer return over the life of the leases due to the fact that if a lower rate is put into the lease now and economic conditions change favorably during the term of the lease, there would be no opportunity for upward readjustment.

(Decisions dated Sept. 30, 1985, at 1). Texasgulf did not appeal either decision.

BLM, by decision issued on December 2, 1985, found that Texasgulf, having failed to appeal or relinquish the leases, "is deemed to have agreed to the readjusted terms. Therefore U-04563 is readjusted effective June 1, 1985 and U-059944 is readjusted effective September 1, 1985."

On February 4, 1988, Texasgulf requested approval of assignment of 100-percent of the operating rights in the three leases to Moab Salt, Inc. The record reveals that, in determining whether to approve the assignment, inquiry was made as to "whether the accounts for these leases were in good standing or if rental and royalty requirements have accrued." On May 13, 1988, BLM "corrected" the minimum royalty due under the three leases, stating:

> Under Part II, Sec. 2 (b)(2) of the readjusted terms and conditions, the minimum royalty rate has been set at $2.00 per acre or fraction thereof. However, as provided by the regulatory change that became effective as of April [sic] [should read May] 25, 1984, all leases readjusted after that date shall require a minimum royalty of $3.00 per acre or fraction thereof, beginning with the first full year of the readjusted lease (43 CFR 3503.2-2(c)) [1988].
>
> Inasmuch as this regulation was in force at the time the subject readjustments became effective, the minimum royalty rate for leases U-0141157, U-04563 and U-059944 is hereby corrected to be $3.00 per acre or fraction thereof, retroactive to the time of readjustment.

(Decision dated May 13, 1988).

BLM further notified Texasgulf that assignments submitted for approval would be held "in abeyance until the accounts for the subject leases are brought into good standing or until the assignee and their surety accepts in writing all outstanding liabilities of the assignor as required by 43 CFR 3506.4." Id.

From the decision that corrected the minimum royalty this appeal was taken. After Texasgulf's appeal was filed, BLM requested return of the
case file from the Board to permit final action on Texasgulf's assignments of operating rights to Moab Salt, Inc. The assignments were approved by decision dated March 20, 1989. Challenging the increase in minimum royalty to $3 per acre for all three leases, Texasgulf contends that "BLM's 'correction' of the minimum royalty rate was not in accordance with * * * applicable laws and regulations nor does it represent proper administration of the public lands" (Statement of Reasons (SOR) at 6).

Although BLM found that 43 CFR 3503.2-2(c) (1988) was in effect at the time of readjustment, appellant argues BLM incorrectly assumed that readjustment took place after the end of the initial 20-year term of leases U-04563 and U-059944. Id. at 7. Texasgulf draws support for this analysis from comments published with 43 CFR 3503.2-2(c) (1988), which discuss the meaning of the regulatory provision that "[o]n or after the effective date of these regulations, the rate of minimum royalty in lieu of production * * * shall be $3 per acre or fraction thereof per year, payable in advance."

Texasgulf argues that, in response to comments to the quoted provision of the regulation, it was explained that "[t]he minimum royalty provisions have been modified by the final rulemaking to apply only to leases issued after the effective date of this final rulemaking and to leases subject to renewal or readjustment on or after the effective date of this final rulemaking." 49 FR 17895 (Apr. 25, 1984). Texasgulf contends that leases U-04563 and U-059944 were "subject to readjustment" when their initial 20-year lease terms expired on "June 1, 1980 and September 1, 1981 respectively, and therefore are exempt from the application of this regulation" (SOR at 7). Texasgulf argues that Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949 (10th Cir. 1982), supports this position. Analyzing coal lease readjustment cases involving similar readjustment provisions, Texasgulf quotes Rosebud Coal Sales Co. v. Andrus, supra:

> A time is thus stated when the government can "readjust" the royalty and other terms--at the end of each twenty-year period. This provides a right to the Government in the nature of an
> option to make adjustments it considers necessary or to let the opportunity pass * * *. [I]t is not difficult to reach the conclusion that the readjustment was to be when each twenty-year
> period expired, on that date and not at a later time. The statement of "at the end of" on its face is not susceptible to any variation as it is a precise time.

Id. at 951.

Citing Noranda Exploration, Inc., 71 IBLA 9 (1983), Texasgulf points out that this Board has recognized that the Rosebud holding on this point applies to potassium leases as well as to coal leases because similar statutory, regulatory, and lease provisions are involved. Consequently, Texasgulf argues, Rosebud establishes that readjustment is an event that occurs at the end of each 20-year lease term. This is important, Texasgulf points out, because the $2 minimum annual royalty rate set in 1982 under provision of 43 CFR 3503.3-2(b)(5) (1980) was the rate in effect when the

first 20-year term for lease U-04563 and U-059944 expired. From this premise Texasgulf reasons:

> More than three (3) years passed before BLM responded to Texasgulf's objections. During that time frame, the new
> $3.00 per acre minimum royalty regulation took effect (i.e., May 25, 1984). The expiration of the appeal period to BLM's September 30, 1985 decision served to confirm BLM's proposed
> terms and the effective dates of readjustment are merely the result of the administrative appellate process.

(SOR at 8). "These dates," appellant avers, "do not constitute new dates upon which the leases were 'subject to readjustment.'" Id. at 9.

Appellant contends, further, that the doctrine of administrative finality bars BLM from adjusting the minimum royalty rates. Texasgulf urges that BLM's March 1 and September 30, 1985, decisions became final 30 days after those dates because no appeal was filed and BLM now cannot modify those final decisions. Citing Union Oil Company of California, 71 I.D. 169, 177 (1964), Texasgulf explains that the administrative finality doctrine is "designed to achieve orderliness in the administration of public lands as well as finality of decisions which have been closed finally and have not been appealed or otherwise attacked." According to Texasgulf, this doctrine must be applied not only to lessees adversely affected by decision of BLM, but also to actions taken by BLM in the course of the performance of its duty (SOR at 10).

Alternatively, Texasgulf argues that, if the doctrine of administrative finality should not be applied here, then for legal and equitable reasons Texasgulf should be allowed to attack the legality of the 1985 BLM decisions. Texasgulf argues that BLM lacked legal authority to change the original lease terms because it failed to send a timely notice of readjustment in the case of lease U-04563 and that it failed to readjust the terms of lease U-059944 timely after giving notice of readjustment, consistent with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987); FMC Wyoming Corp. v. Hodel, 816 F.2d 496 (10th Cir. 1987) (SOR at 12-13); and Atlantic Richfield Co., 99 IBLA 179 (1987).

Additionally, Texasgulf contends BLM is estopped by the 1985 decisions from increasing the minimum royalty rate for any of the three leases (SOR at 14-15). Finally, Texasgulf contends imposition of the $3 rate is a prohibited retroactive application of later promulgated rules (SOR at 15).

[1] While the scope of changes to potassium lease terms at readjustment is not limited by statute, Departmental action is limited both by lease terms and regulations in effect on the date of lease readjustment. Readjustment occurs "at the expiration of the 20-year period, on that date and not at a later time." Rosebud Coal Sales Co. v. Andrus, supra at 951.

Provisions of 43 CFR 3503.3-2(b) (1984) distinguish leases issued on or after the effective date of the regulation from leases which become subject to renewal and readjustment after that date. The regulation provides, pertinently, that:

> (2) Leases issued on or after the effective date of these regulations shall require an advance annual minimum royalty payment of $3 per acre or fraction thereof per year beginning with the sixth year of the lease and continuing throughout the life of the lease.
>
> (3) Leases due for renewal or readjustment after the effective date of these regulations shall require a minimum annual royalty payment of $3 per acre or fraction thereof beginning with the first full year after the date of the renewal or readjustment.

43 CFR 3503.3-2(b)(2) and (3) (1984).

Earlier versions of this regulation consistently used the readjustment date to trigger new minimum royalty requirements. For example, 43 CFR 3503.3-2(b)(1) (1980) provided: "The District Mining Supervisor shall have discretion, upon the request of the lessee, to authorize the advance payment of a minimum royalty in lieu of continued operation for any particular year" and subsection (5) of this regulation provided:

> Any potassium, sodium, phosphate or sulfur lease renewal or readjustment after the effective date of these regulations shall require a minimum production or royalty rate of $2 per acre per year, as adjusted in accordance with paragraph (b)(6) of this section, beginning with the next anniversary date after renewal or readjustment.

43 CFR 3503.3-2(b)(5) (1980). This regulation remained in effect from June 27, 1980 (45 FR 36035, May 28, 1980), until May 24, 1984.

Accordingly, we must reverse BLM's decision increasing minimum annual royalty for leases U-04563 and U-059944 from $2 to $3 per acre, because 43 CFR 3503.3-2(b) (1980) was in effect when both leases became subject to readjustment and provided the sole authority for modification of existing royalty rates. 4/ Inasmuch as this regulation provided for payment of royalty at the $2 rate, it was error to use the higher rate.

[2] On December 1, 1984, the date of readjustment of potassium lease U-0141157, Departmental regulation 43 CFR 3503.3-2 (1984) was in effect.
Notwithstanding this rule change, BLM did not apply the 1984 regulation to set the required $3 minimum rate. For leases readjusted after May 25, 1984, however, the regulatory mandate is not susceptible to variation, and BLM had no authority not to use the $3 minimum royalty provision in the readjustment of lease U-0141157.

It follows, therefore, in the case of lease U-0141157 also, that duly promulgated regulations must be given the force and effect of law. Shell Offshore, Inc., supra; American Gilsonite, 111 IBLA 1, 96 I.D. 408 (1989). And where actions by employees of the Department are inconsistent with

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4/ The new royalty rate "begin[s] with the next anniversary date after renewal or readjustment," i.e., June 1, 1981, and Sept. 1, 1982, respectively. 43 CFR 3503.3-2(b)(5) (1980).

applicable regulations, the Department is not estopped to correct such error. Atlantic Richfield Co. v. Hickel, 432 F.2d 587, 591 (10th Cir. 1979); Shell Offshore, Inc., supra. Such error cannot, moreover, create rights not authorized by law. Utah Power & Light Co. v. United States, supra; Shell Offshore, Inc., supra; Sonat Exploration Co., 105 IBLA 97 (1988); Hiko Bell Mining & Oil Co. (On Reconsideration), 100 IBLA 371, 95 I.D. 1 (1988). To allow readjustment of potassium lease U-0141157 to be made at a rate lower than the $3 minimum annual royalty was contrary
to 43 CFR 3503.3-2 (1984). Consequently BLM's decision to correct the minimum royalty rate for lease U-0141157 was proper and must be affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 13, 1988, decision by BLM relating to potassium lease U-0141157 is affirmed, but reversed as it relates to potassium leases U-059944 and U-04563. 5/

Franklin D. Arness
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge

5/ The record indicates that the decision to readjust this lease made on Dec. 2, 1985, although that decision is not before us for review on this appeal, (see 43 CFR 4.411, establishing limits on this Board's review authority) is not correct for reasons set out in Noranda Exploration, Inc., supra. In Noranda we found that, in order to preserve the right to read-just a potassium lease, notice must be given prior to the end of the 20-year lease term. Id. at 71 IBLA 11. This was not done for lease U-04563. A recent decision, Wyodak Resources Development Corp. v. Lujan, Docket No. C89-0057J (D. Wyo. Jan. 11, 1990), has opined that the Depart-ment may not, after failing to timely readjust a lease's terms, set a new royalty rate, because notice of readjustment was not given. The Court phrased this finding as a rhetorical question, stating:

"A more proper rhetorical inquiry is, then, if the Secretary lacked
the authority to impose on a surface coal mine a royalty of less than the congressionally mandated minimum, could he, by default, by failing to timely readjust a lease's terms, set a royalty rate which he had no authority to set?"

(Slip Op. at 7). The answer, of course, is that he could not do so. Appellant may wish to apply to BLM to take corrective action regarding
lease U-04563, consistent with this opinion and the Noranda decision.